SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 399

UNITED STATES OF AMERICA,
Appellee,

versus

NEW ORLEANS INSURANCE EXCHANGE,
Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division.

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IN THE

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Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division.

JURISDICTIONAL STATEMENT.

(a) The Opinion and Decree by United States District Judge J. Skelly Wright in accordance with the Findings of Fact and Conclusions of Law, dated February 5, 1957, is reported at 148 F. Supp. 915. A copy of this Opinion and Decree is attached hereto as Appendix "A".

(b) The complaint charged the New Orleans Insurance Exchange with violations of Sections 1 and 2 of the Sherman Anti-Trust Act. The Final Judgment enjoined and restrained the New Orleans Insurance Exchange from continuing the activities charged in the complaint as being violative of Sections 1 and 2 of the Sherman Anti-Trust Act.

As the United States is complainant in this civil action brought in a district court of the United States under the Sherman Anti-Trust Act, this appeal from the final judgment is taken directly to the Supreme Court of the United States.

(i) This is a civil action seeking to enjoin the New Orleans Insurance Exchange and its respective members, named as co-conspirators, from the activities charged in the complaint as being violative of Sections 1 and 2 of the Sherman Anti-Trust Act. The text of Sections 1 and 2 of the Sherman Anti-Trust Act is attached hereto as Appendix "B".

(ii) The Final Judgment of United States District Judge J. Skelly Wright was dated March 19, 1957, and said Judgment was entered on March 19, 1957.

On March 29, 1957, appellant moved for a new trial or to amend and supplement Findings of Fact, Conclusions of Law and Judgment.

Appellant's Motion for a New Trial was denied by United States District Judge J. Skelly Wright on April 10, 1957.

Appellant's Notice of Appeal to the Supreme Court of the United States was filed on May 27, 1957 in the United States District Court for the Eastern District of Louisiana, New Orleans Division.

Appellant, on July 18, 1957, moved for an extension of time to docket the Appeal in the Supreme Court of the United States.

On July 22, 1957, United States District Judge Herbert Christenberry rendered an Order granting appellant through September 23, 1957 in which to file the record in the Supreme Court of the United States.

(iii) This appeal is taken pursuant to 15 U. S. C. A. Section 29 (Feb. 11, 1903, c. 544, Section 2, 32 Stat. 823; Mar. 3, 1911, c. 231, Section 291, 36 Stat. 1167; June 9, 1944, c. 239, 58 Stat. 272; June 25, 1948, c. 646, Section 17, 62 Stat. 989), providing that in every civil action brought in any district court of the United States under the Sherman Anti-Trust Act, as amended, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court. The text of the foregoing statute is attached hereto as Appendix "C".

(iv) In the case of *U. S. v. Oregon State Medical Society, et al.*, this Honorable Court allowed a direct appeal from the judgment of a United States district court in a case where the Government sought an injunction against violations of the Sherman Act. *United States of*

America v. Oregon State Medical Society, et al., Or. 1952, 72 S. Ct. 690, 343 U. S. 326, 96 L. Ed. 978.

See also:

United States of America v. Line Material Co., Wis. 1948, 68 S. Ct. 550, 333 U. S. 287, 92 L. Ed. 701.

And,

United States of America v. United States Gypsum Co., 1948, 68 S. Ct. 525, 333 U. S. 364, 92 L. Ed. 746, rehearing denied, 68 S. Ct. 788, 333 U. S. 869, 92 L. Ed. 1147.

(v) The text of the Sherman Anti-Trust Act of July 2, 1890, 15 U. S. C. A. Sections 1 and 2 is attached hereto as Appendix "B".

(c) (1) The following questions are presented by this appeal:

(A) Do the alleged activities of the New Orleans Insurance Exchange (a nontrading, nonprofit trade association of stock company fire and casualty insurance agents operating only in the Parishes of Orleans, Jefferson and St. Bernard, State of Louisiana) **involve interstate commerce,** so as to be subject to the provisions of Sections 1 and 2 of the Sherman Act, as amended; or **are the activities of the defendant beyond the scope of the Sherman Act,** as amended, in view of the fact that **insurance is not interstate commerce,** as held in *Paul v. Virginia*, 75 U. S. (8 Wall.) 168, 19 L. Ed. 357, and numerous subsequent decisions of the Supreme Court of the United States?

(B) If the business of insurance is interstate commerce, so as to give Congress the right, under the Commerce Clause of the United States Constitution to control the activities of the New Orleans Insurance Exchange, **has Congress delegated to the several states the right to govern and regulate the business of insurance, by adopting the McCarran Act,** 15 U. S. C. A. Sections 1011, 1012, 1013 (Mar. 9, 1945, c. 20, Secs. 1, 2, 3, 59 Stat. 34; July 25, 1947, c. 326, 61 Stat. 448).

(C) If, by adopting the McCarran Act, Congress has delegated to the several states the right to govern and regulate the business of insurance, **did the State of Louisiana adopt a comprehensive insurance code which completely regulates the business of insurance in Louisiana, with the result that the alleged activities of the defendant Insurance Exchange are controlled by the Louisiana Insurance Code rather than by the Sherman Act, as amended?**

(D) **Does the exception established by Section 3(b) of the McCarran Act have the effect of nullifying state control of the alleged acts of the defendant involving "boycott, coercion or intimidation",** so as to render the Sherman Act, as amended, applicable to the alleged activities of the New Orleans Insurance Exchange, and remove said activities from state control?

(E) **Do Sections 1 and 2 of the Sherman Act prohibit "boycott, coercion or intimidation",** or does the Sherman Act, on the contrary, prohibit **combinations in restraint of trade, monopolies, and attempts to restrain trade or monopolize commerce?** Stated differently, **does the exception in Sec. 3(b) of the McCarran Act create a new**

category of acts prohibited by the Sherman Act, namely "boycott, coercion, or intimidation"?

(F) If the Sherman Act, as amended, is applicable to the alleged activities of the defendant, **has the Government sustained its burden of proving the allegations of the complaint** with reference to the alleged combination in restraint of trade, monopoly, or attempts to combine or monopolize interstate commerce, particularly with reference to the alleged effect on (a) Insurance Companies, and (b) fire and casualty agents who are not members of the Exchange?

(G) **Did the trial judge improperly admit evidence of alleged activities which occurred long prior to the filing of the complaint,** where there was no indication that the alleged activities were continuing or threatened at the time the complaint was filed, or thereafter?

(H) **Did the trial judge improperly issue an injunction to restrain alleged activities which were neither occurring nor threatened at the time of the filing of the complaint or thereafter?**

(I) **Did the trial judge improperly permit the enlargement of the pleadings during the trial of the case, so as to admit evidence pertaining to surety business,** despite the fact that the complaint and all pretrial conferences were limited to allegations of alleged violations involving only **fire and casualty insurance, without any reference whatever to surety business?**

(J) If the alleged activities of the defendant involved or affected interstate commerce, was the interstate commerce substantial?

(K) If the activities of the New Orleans Insurance Exchange constituted a boycott, or refusal to deal, and if said activities are subject to the provisions of the Sherman Act, as amended, were the said activities **reasonable, within the "Rule of Reason" recognized by the Supreme Court of the United States?**

(d) The New Orleans Insurance Exchange, appellant, is a private association of one hundred thirty (130) insurance agents or agencies engaged in the casualty and surety insurance business in the New Orleans area, which is composed of Orleans, Jefferson, and St. Bernard Parishes. The complaint charged the New Orleans Insurance Exchange with violations of Sections 1 and 2 of the Sherman Anti-Trust Act. Specifically, the complaint charges that the Exchange and its members are engaging in an unlawful combination and conspiracy to restrain interstate commerce in insurance and to acquire a monopoly in its area of operation by maintaining a group boycott against all non-member insurance agencies as well as against all insurance companies which do not plant exclusively through Exchange outlets or members. The New Orleans Insurance Exchange denied that it unreasonably restrained trade or acquired a monopoly or conspired or attempted to do so, and it also denied that its members are engaged in interstate commerce. It further contended that the "*McCarran Act*", 15 U. S. C. A., Section 1013 (a) and (b) expressly excludes the business of insurance from the

operation of the federal antitrust laws. The text of the McCarran Act is attached hereto as Appendix "D".

(e) (Not applicable).

(f) Appellant respectfully submits that the statute cited in Paragraph (b) (i) herein, and the text of which is set forth in full in Appendix "C", expressly and exclusively confers jurisdiction on this Court.

This litigation raises the clear cut and serious question of whether, by the application of the Sherman Act, the Insurance Commissioners of the respective states are being deprived of their responsibility and authority for the taxing and regulation of the business of insurance, such responsibility and authority being expressly recognized by the Congress in the preamble of the "McCarran Act", and being specifically delegated, in the text of the Act, to the several states.

The construction placed by the Government and by the trial judge on a narrow exception contained in the McCarran Act is to nullify effect of the Act itself and defeat the express purpose of the Congress in delegating to the several states the right to regulate the business of insurance.

Appellant respectfully submits that the Federal questions presented are so substantial as to require plenary consideration, with briefs and oral argument, for their resolution.

(g) The injunction in this case was not interlocutory, but was issued after a trial on the merits.

(h) The ruling of United States District Judge J. Skelly Wright on appellant's Motion to Dismiss was entered as a Minute Entry November 18, 1954. A copy of this ruling, denying the Motion to Dismiss, is attached hereto as Appendix "E".

The Findings of Fact and Conclusions of Law by United States District Judge J. Skelly Wright are dated February 5, 1957. A copy of the Findings of Fact and Conclusions of Law are attached hereto as Appendix "F".

The Opinion and Decree by United States District Judge J. Skelly Wright in accordance with the Findings of Fact and Conclusions of Law is dated February 5, 1957. A copy of this Opinion and Decree is attached hereto as Appendix "A".

The Final Judgment rendered by United States District Judge J. Skelly Wright is dated March 19, 1957, and a copy is attached hereto as Appendix "G".

On March 29, 1957, appellant filed a motion for new trial or to amend and supplement Findings of Fact, Conclusions of Law and Judgment.

Appellant's Motion for a New Trial was denied on April 10, 1957. Appellant's Motion to Amend the Findings of Fact and Conclusions of Law was partially granted by United States District Judge J. Skelly Wright under Minute Entry dated April 10, 1957. A copy of the Order denying appellant's Motion for a New Trial and granting partial amendment to the Findings of Fact and Conclusions of Law is attached hereto as Appendix "H".

Appellant respectfully submits that the questions presented by this appeal are substantial and of general public importance and merit full consideration by this Court.

Appellant accordingly prays that this Court enter an Order noting jurisdiction.

Respectfully submitted,

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CERTIFICATE.

I, MURRAY F. CLEVELAND, one of the attorneys for the New Orleans Insurance Exchange, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22nd day of August, 1957, I served copies of the foregoing Statement of Jurisdiction on the United States of America, by (a) leaving a copy thereof at the office of M. Hepburn Many, United States Attorney for the Eastern District of Louisiana, Federal Building, New Orleans, Louisiana, and (b) by mailing copies thereof in properly addressed envelopes, with air mail postage prepaid to (1) the Solicitor General, Department of Justice, Washington 25, D. C., and (2) Edward R. Kenney and William Rowan, Esqs., Counsel of record for the Government.

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APPENDIX "A".

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 4292
CIVIL ACTION

UNITED STATES OF AMERICA,
Plaintiff

versus

NEW ORLEANS INSURANCE EXCHANGE,
Defendant.

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WRIGHT, District Judge:

The New Orleans Insurance Exchange, a private association of 130 insurance agencies[1] which control approximately three-fourths[2] of the fire, casualty and surety[3] insurance business in the New Orleans area,[4] is charged in these proceedings with violations of Sections 1 and 2 of the Sherman Act.[5] Specifically, the complaint charges that the

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[1] These independent agencies are part of what is called the American agency system, that is, they solicit insurance from the public and place it, at their election, with one or more of several companies represented by them. The agencies own what are called "expirations" on the policies handled by them. Expirations are the property right which inheres in having sold the existing policy and in knowing when it will expire, so that a renewal may be obtained. It is generally recognized in the trade that one who owns the expirations, generally speaking, controls renewals.

[2] The Exchange occupies a dominant position in the fire, casualty and surety insurance market in the New Orleans area. During the period 1951 through 1954, member agents wrote: (1) 65.1% of all multiple lines of insurance written by fire and casualty companies in the New Orleans area; (2) 71.6% of all lines of insurance written in the New Orleans area under the jurisdiction of the Exchange; (3) 81.3% of fire insurance written in the New Orleans area; (4) 67.4% of casualty insurance (excluding accident and health) in the New Orleans area; and (5) 98.1% of surety insurance in the New Orleans area. In addition, member agents represent over 90% of the stock fire and casualty companies in the United States which possess assets in excess of $50,000,000. The dollar volume of business written by Exchange members is substantial, amounting to approximately $25,000,000 to $30,000,000 in premiums annually.

[3] The complaint does not specifically cover contracts of surety although such contracts may be included in the term casualty insurance. In any event, no objection was made to the evidence concerning surety agreements when it was first offered and no prejudice is shown by the admission thereof. Rule 15 (b), Fed. R. Civ. P.

[4] This area is composed of Orleans, Jefferson and St. Bernard Parishes.

[5] The relevant sections of the Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209, as amended) provide in part as follows:

"Sec. 1. (26 Stat. 209; 50 Stat. 693; 15 U. S. C. §1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *

"Sec. 2 (26 Stat. 209; 15 U. S. C. §2) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or

Exchange and its members are engaging in an unlawful combination and conspiracy to restrain interstate commerce in insurance and to acquire a monopoly in its area of operations by maintaining a group boycott against all non-member insurance agencies as well as against all insurance companies which do not plant exclusively through Exchange outlets or members.

The defendant admits the boycott but denies that it unreasonably restrains trade or tends toward monopoly. It also denies that its members are engaged in interstate commerce. It asserts further that the McCarran Act[6] excludes the business of insurance from the operation of the federal antitrust laws.

The group boycott is effected through a series of bylaws of the Exchange by which members thereof agree to boycott any stock company which plants through any except Exchange agents in the New Orleans area,[7] to boy-

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with foreign nations, shall be deemed guilty of a misdemeanor, * * *

"Sec. 4. (26 Stat. 209; 15 U. S. C. §4.) The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *"

[6] 15 U. S. C. §1013 (a) and (b).

[7] The bylaws read as follows:

Article X, Section 1:

"Active Members shall not accept or retain the agency of any company, including Underwriters of same, which has or whose General Agent or Manager has agents within the jurisdiction of this Exchange who are not Active Members of the Exchange."

Article X, Section 2:

"Active Members shall not accept or retain the agency of any insurance company, including its parent corporation, all underwriting agencies of such company, members of a group or fleet of companies, and all companies owned, either in whole or in part, managed, controlled, directly or indirectly, or reinsured by such company, unless all agents within the jurisdiction of this Exchange, of such insurance companies, are members of this Exchange."

cott any stock company which sells directly to the public,[8] to boycott mutual companies irrespective of how or by whom the insurance is sold,[9] and to boycott nonmember agencies so that the facilities of companies planting exclusively through Exchange outlets are denied such agents.[10] These bylaws are rigidly enforced. All members are under obligation to police other members and to report violations. A member charged must make a full disclosure by presenting his books and records for examination by the Exchange, and any member found guilty of violation of bylaws is substantially fined or expelled from the Association. When a member is expelled from the Exchange, he is stripped of his representation of Ex-

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[8] The bylaw reads as follows:

Article X, Section 3:

"Active or Associate Members of this Exchange may not represent or place business with a company, not a member of this Exchange, whose State Agent, Special Agent, Manager or salaried representative solicits from or issues policies or bonds direct to the public within the jurisdiction of this Exchange or accepts such business from a non-member of this Exchange."

[9] The bylaw reads as follows:

Article IX, Section 6:

"It shall not be permissible for Members to place business within the jurisdiction of the Exchange with non-member agents or with any type of non-stock carriers unless and until the facilities of all members of the Exchange have been exhausted and an affidavit to that effect has been filed with the Secretary of the Exchange within ten days of the binding of the risk."

[10] The bylaws read as follows:

Article IX, Section 6 (See Note 9)

Article IX, Section 7:

"It is permissible for Active Members to accept business from Non-Member Agents and Brokers domiciled in the territorial jurisdiction of the Exchange, provided no commission or other valuable consideration is paid directly or indirectly on such business; and, provided further, that the member immediately notify the Secretary of the Exchange in writing, giving the name of the Non-Member, character and location of the risk, amount of insurance and premiums, and further pays to the Exchange, promptly, an amount equal to 10% of the net premiums involved, which said amount so paid, shall go towards the cost of keeping a record of such transactions."

change controlled companies and is thus required to operate outside the Exchange subject to the group boycott provided in the bylaws.

The effect of the boycott, as shown by the evidence, is that practically all the major stock companies plant exclusively through Exchange outlets and deny their facilities to non-Exchange members, in spite of the fact that in other areas uncontrolled by similar boycott, the same insurance companies plant through agents representing all types of insurance companies, including mutuals. In fact, some of the stock companies whose method of operation is controlled by the boycott of the defendant Exchange sell directly to the public in uncontrolled areas. Moreover, by being denied the facilities of the large stock companies controlled by the Exchange, nonmember agents operating in the area are relegated to handling risks which do not require the capacity of the controlled companies. Insurance companies such as mutuals and direct writers, who are not allowed to plant through Exchange outlets, are subjected to the group boycott and are thus excluded from the substantial market controlled by the Exchange. An additional effect of the group boycott is that part of the public which has placed its confidence concerning insurance matters with members of the Exchange is denied access to low cost insurance.

The Government insists, with much support from the authorities, that the bylaws of the Exchange, rigorously enforced as they are, constitute a per se violation of the Sherman Act. In fact, this case is remarkably close in many of its aspects to *Fashion Originators' Guild of America, Inc. v. Federal Trade Commission*, 312 U. S. 457, where the Court held that evidence on the question of

reasonableness of the boycott there in suit was immaterial, that, without more, the purpose and object of the unlawful combination, its tendency toward monopoly and the coercion practiced upon a rival method of competition brought it within the prohibition of the Sherman Act.

In the Fashion Guild case, the defendants were designers, manufacturers and distributors of women's clothes. In order to control what they considered to be piracy of their clothing designs, the members of the Guild devised a plan whereby they refused to sell to retailers who purchased and sold garments which were unauthorized copies of designs of Guild members. The Supreme Court held that the combination was "well within the inhibition of the policies declared by the Sherman Act itself."[11] The language used by the Court in denouncing the vices of the Guild's scheme is so pertinent here that it bears repeating.[12] The Supreme Court has also indicated in *Inter-*

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[11] **Fashion Originators' Guild v. Federal Trade Commission**, supra, p. 465.

[12] In **Fashion Originators' Guild v. Federal Trade Commission**, supra, at pp. 465 and 466, the Court said:

> "And among the many respects in which the Guild's plan runs contrary to the policy of the Sherman Act are these: it narrows the outlets to which garment and textile manufacturers can sell and the sources from which the retailers can buy (**Montague & Co. v. Lowry**, 193 U. S. 38, 45; **Standard Sanitary Mfg. Co. v. United States**, 226 U. S. 20, 48-49); subjects all retailers and manufacturers who decline to comply with the Guild's program to an organized boycott (**Eastern States Retail Lumber Dealers' Assn. v. United States**, 234 U. S. 600, 609-611); takes away the freedom of action of members by requiring each to reveal to the Guild the intimate details of their individual affairs (**United States v. American Linseed Oil Co.**, 262 U. S. 371, 389); and has both as its necessary tendency and as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied designs (**United States v. American Linseed Oil Co.**, supra, at 389). In addition to all this, the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.' **Addyston Pipe & Steel Co. v. United States**, 175 U. S. 211, 242."

national Salt Co., Inc. v. United States,[13] 332 U. S. 392, and *United States v. Columbia Steel Co.*,[14] 334 U. S. 495, that group boycotts are unreasonable per se and "clearly run afoul of Section 1"[15] of the Sherman Act.

But it is not necessary to decide this case on a per se basis. The rule of reason[16] dictates that this illegal combination must be destroyed. As shown above, the group boycott in suit not only had the potential unreasonably to coerce, restrain and control interstate commerce in insurance in the New Orleans area but it actually did. In fact, this defendant, through the dominant position of its membership, sits astride the stream of interstate commerce in insurance in the New Orleans area and directs its flow. It allows the large stock companies access to its outlets on condition that those companies participate in its group boycott of nonmember agencies. **It refuses to allow any part of the 75 per cent of the insurance which it controls to move in the direction of mutuals or direct writers,**

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[13] In International Salt Co. v. United States, supra, at p. 396, the Court said:

> "Not only is price-fixing unreasonable, per se (citing cases), but also it is unreasonable, per se, to foreclose competitors from any substantial market. Fashion Originators Guild v. Federal Trade Commission, 114 F. (2d) 80, affirmed, 312 U. S. 457."

[14] In United States v. Columbia Steel Co., supra, at pp. 522, 523, the Court said:

> "A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal per se. For example, where a complaint charges that the defendants have engaged in price fixing, or have concertedly refused to deal with non-members of an association, or have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial because such restraints are illegal per se. * * *"

[15] The Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 625.

[16] See Standard Oil Company v. United States, 221 U. S. 1.

and it relegates the numerically superior nonmember agencies to the discriminatory position of scrambling for the remaining 25% of the business while excluding them from placing it with the major stock companies controlled by the Exchange. Such unreasonable restraints are calculated to affect adversely the persons subjected to the discrimination, and this record confirms the calculation.

In short, the Exchange practices are essentially the same, in purpose and effect, as those denounced as violative of the Sherman Act in Fashion Guild, supra. And here the evidence demonstrates that these practices not only tended to but actually did impose unreasonable restraints on interstate commerce. The Exchange's group boycott narrows the outlets or agents through which insurance companies can sell and the sources or companies through which agents can place insurance; it takes away the freedom of action of its own members by requiring them to participate in the boycott and to reveal to the Exchange the intimate details of their individual affairs to insure that they do; it suppresses competition from mutual and direct writer insurance companies as well as competition from nonmember agencies generally; and in addition to all this, the Exchange is in reality a private super-governmental agency which prescribes rules for the regulation and restraint of interstate commerce, provides extra-judicial tribunals for determination and punishment of violations, and thus trenches beyond the power of the national and state[17] legislatures, in addition to violating the Sherman Act.

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[17] Louisiana has a comprehensive insurance code providing for the complete regulation of the insurance industry within the state. La. R. S. 22:1-22:1734.

Group boycotts and concerted refusals to deal flout the Sherman Act's command that competition rule the market place. Our economic faith is predicated on free competition uninhibited by group boycotts or other predatory practices. Not only must merchandise stand the cold test of competition, but services performed in connection with the sale thereof must be submitted to the same test, so that, in the last analysis, the public may have a free choice in spending its money, and businesses, willing and able to compete for that money, may have a free opportunity to do so. Therefore, any group boycott or concerted refusal to deal, if in fact not a per se violation of the Sherman Act, must, at the very least, be viewed with dark suspicion because of the commercial restraints and tendency toward monopoly inherent in such combinations. Where, as here, it is shown that the group boycott imposes unreasonable restraints on interstate commerce in violation of Section 1 of the Sherman Act, a Section 2 violation is just a short step away, for most, if not all, unreasonable restraints have as their purpose the acquisition of at least a greater share of commerce than could otherwise be obtained in a free economy. Combinations indulging in group boycotts, then, must be put to proof to clear themselves of the predatory intent required for violation of Section 2 of the Act. *Standard Oil Company v. United States*, supra, p. 75. Here such proof is wholly lacking. On the contrary, this record depicts a nascent, if not an accomplished, monopoly, nurtured by group boycott.

The Exchange makes the contention that its group boycott of non-members and uncooperative insurers does not deny them the right to approach the public and sell insurance outside the Exchange. That is true. But it is

the agency who controls the insurance buyer and the placement of his insurance. Admittedly, the Exchange agencies control approximately 75 per cent of the concerned insurance purchased in the New Orleans area. That insurance is placed with companies chosen by the agencies and not by the assureds. Consequently, any company who is allowed to plant through Exchange agencies, even on an exclusive basis, is happy to accept the "invitation" since otherwise it would be denied access to three-fourths of the insurance business in the area. And the minute a company submits to Exchange coercion and control, nonmember agencies are denied access to that company for the placement of risks.

The result, therefore, is that not only are the mutuals and other companies operating outside the Exchange excluded from a substantial market by a group boycott effected through the use of the dominant position of the Exchange, but companies allowed to do business through the Exchange outlets are actually controlled in their method of doing business in that, in addition to being denied the right to deal directly with the public, they must participate in the Exchange boycott of nonmember agencies. Not only are nonmember agencies restricted in their operations by a group boycott effected through the use of the dominant position of the Exchange, but the member agencies themselves are prisoners, sometimes unwilling prisoners, of their own rules, for they, too, are limited in their operations under pain of expulsion and boycott. It must be remembered that in suit here is a group boycott, participation in which is required of every Exchange member by its bylaws. While an individual agency may have the right to boycott another agency or

an insurance company,[18] a concerted refusal to deal brings the combination within the condemnation of the Sherman Act. *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U. S. 211; *American Medical Association v. United States*, 317 U. S. 519; *Paramount Famous Corp. v. United States*, 282 U. S. 30; *Eastern States Retail Lumber Dealers' Ass'n. v. United States*, 234 U. S. 600.

The Exchange also states that its reason for boycotting mutual insurance companies is that the mutuals are socialistic in character whereas its membership is dedicated to the American way of life. That argument sounds high and lofty but the truth is that not only are mutuals boycotted under the requirements of the bylaws, but any company, stock, mutual or otherwise, which does not plant exclusively with Exchange members is likewise discriminated against. Thus the touchstone for acceptance by the Exchange is not belief or disbelief in socialism but willingness to submit to the restraints imposed by the Exchange.

The Exchange also argues that the reason for the restrictive bylaws is to protect the American agency system. But good intent is no defense under Section One of the Act except in non per se violations where unreasonable restraints are not shown. *United States v. Columbia Steel Co.*, supra, p. 522. Where, as here, unreasonable restraints are shown, the requisite intent is inferred from the unlawful effects. *The Times-Picayune Publishing Co. v. United States*, supra, p. 614; *United States v. Griffith*, 334 U. S. 100, 105, 108; *United States v. Patten*, 226 U. S. 525, 543.

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[18] Compare Lorain Journal v. United States, 342 U. S. 143; United States v. Colgate & Co., 250 U. S. 300.

The asseverations of good intent are also subject to considerable question. The evidence shows that mutual companies who are not direct writers also use the American agency system. In fact, all of the government's witnesses are mutual agents who are a part of the American agency system. Moreover, unt. 1950 there was an Exchange bylaw which applied the boycott against participating stock companies[19] using the American agency system, irrespective of their willingness to submit to Exchange control. Although the bylaw was repealed in 1950, the evidence shows that the boycott continues. It would seem, therefore, that the reason for the boycott of mutual as well as participating stock companies, as shown by the minutes of the meeting of the Exchange at which the boycott against participating stock companies was adopted, is, not the protection of the American agency system, but the prevention of a possible reduction in agency commissions caused by reduction in cost of insurance to the public.

The defenses of the Exchange regarding interstate commerce and the McCarran Act may be quickly disposed of. In *United States v. Southeastern Underwriters Association*, 322 U. S. 533, the Court held that the business of insurance, when conducted across state lines,[20] is in-

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[19] A participating stock company is like a mutual insurance company in that the policyholders participate in the profits of the company by receiving dividends, thereby reducing the net cost of the insurance.

[20] The record shows that 90% of the insurance companies concerned here are domiciled in states other than Louisiana. In **United States v. Southeastern Underwriters Association**, supra, at p. 537, the Court said:

> "(T)he insurance business * * * include(s) not only the execution of insurance contracts but also negotiations and events prior to execution of the contracts and the innumerable transactions necessary to performance of the contracts. All of these alleged transactions * * * constituted a single continuous chain of events, many of which, * * * could possibly have been continued but for that part of them which moved back and forth across state lines."

terstate commerce. And even where, as here, the challenged activity is at the local level, "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Manufacturers Association*, 336 U. S. 460, 464; *United States v. Employing Plasterers Association of Chicago*, 347 U. S. 186.

It is true that Section 3 (a) [21] of the McCarran Act provides that the Sherman Act "shall not apply to the business of insurance or to acts in the conduct thereof." But Section 3 (b) [22] of the same act provides: "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." The legislative history of Section 3 (b) affirms what its language so plainly says.[23] *United States v. Insurance Board of Cleveland*, 144 F. Supp. 684.

Decree for plaintiff in accord with Findings of Fact and Conclusions of Law this day rendered.

J. SKELLY WRIGHT
United States District Judge

New Orleans, Louisiana
February 5, 1957

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[21] 15 U. S. C. §1013 (a)

[22] 15 U. S. C. §1013 (b)

[23] 91 Cong. Rec. 1486, Feb. 27, 1945. The Senate Judiciary Report on the bill reads:

> "Section 4 (Section 3 of the final enactment) suspends the application of the Sherman Act and the Clayton Act to the business of insurance until January 1, 1948; and (b) provides that at no time are the prohibitions in the Sherman Act against any act of boycott, coercion, or intimidation suspended. These provisions of the Sherman Act remain in full force and effect."

APPENDIX "B"

THE SHERMAN ANTI-TRUST ACT, TITLE 15 U. S. C. A. SECTIONS 1-2

Section 1. **Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with

each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, Section 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.

Section 2. **Monopolizing trade a misdemeanor; penalty**

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, Section 2, 26 Stat. 209.

APPENDIX "C"

TITLE 15 U. S. C. A. SECTION 29

Section 29. **Appeals to Supreme Court**

In every civil action brought in any district court of the United States under any of said Acts (The Sherman Anti-Trust Act of July 2, 1890, and the Clayton Act of October 15, 1914) wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court. (Feb. 11, 1903, c. 544, Section 2, 32 Stat. 823; Mar. 3, 1911, c. 231, Section 291, 36 Stat. 1167; June 9, 1944, c. 239, 58 Stat. 272; June 25, 1948, c. 646, Section 17, 62 Stat. 989.)

APPENDIX "D"

THE McCARRAN ACT
TITLE 15 U. S. C. A. SECTIONS 1011, 1012, 1013

Section 1011. **Declaration of policy**

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States. Mar. 9, 1945, c. 20, Section 1, 59 Stat. 33.

Section 1012. **Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948**

a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance; Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to

the extent that such business is not regulated by State law. Mar. 9, 1945, c. 20, Section 2, 59 Stat. 34; July 25, 1947, c. 326, 61 Stat. 448.

Section 1013. **Suspension until June 30, 1948, of application of certain Federal laws; Sherman Anti-Trust Act, applicable to agreements to, or acts of, boycott, coercion, or intimidation.**

a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation. Mar. 9, 1945, c. 20, Section 3, 59 Stat. 34; July 25 1947, c. 326, 61 Stat. 448.

APPENDIX "E".

MINUTE ENTRY
NOVEMBER 18, 1954
WRIGHT, J.

No. 4292
CIVIL ACTION

UNITED STATES OF AMERICA

versus

NEW ORLEANS INSURANCE EXCHANGE

RULING ON MOTION TO DISMISS COMPLAINT.

This matter came on this day for hearing on the motion of defendant to dismiss the complaint. The Court having heard the argument and studied the briefs filed by counsel for both sides, now makes the following ruling.

IT IS ORDERED that the motion to dismiss be and the same is hereby denied.

REASONS.

The complaint, the allegations of which for the purposes of the motion to dismiss must be taken as true,

charges that the defendant and its membership are engaged in an unlawful combination and conspiracy to restrain and monopolize interstate commerce in the business of selling and writing fire and casualty insurance by means of boycott, coercion and intimidation.

The business of insurance, when conducted across state lines, is interstate commerce. *U. S. v. South-Eastern Underwriters Association*, 322 U. S. 533. Boycotts, coercion and intimidation in the insurance field are subject to the Sherman Antitrust Act. 12 U. S. C. 1013 (b). Though the challenged activity be at the local level, "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *U. S. v. Women's Sportswear Manufacturers Association*, 336 U. S. 460, 464; *U. S. v. Employing Plasterers Association of Chicago*, 347 U. S. 186. The protection of the Sherman Act is not limited to the public or consumers alone. "The act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 236.

s/ J. S. W.

APPENDIX "F".

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 4292
CIVIL ACTION

UNITED STATES OF AMERICA,
Plaintiff

versus

NEW ORLEANS INSURANCE EXCHANGE,
Defendant.

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WRIGHT, District Judge:

FINDINGS OF FACT

1. Defendant, New Orleans Insurance Exchange, is an association of insurance agents, brokers and solicitors, incorporated under the laws of the State of Louisiana. The defendant transacts business in the Parishes of Orleans, Jefferson and St. Bernard, Louisiana,[1] which are within the New Orleans Division of the Eastern District of Louisiana.

2. There are approximately 130 agent members of the defendant Exchange representing 220 stock fire and casualty insurance companies. Each of said agents is engaged in the business of selling fire, casualty and surety insurance in the Parishes of Orleans, Jefferson or St. Bernard, Louisiana.

3. The properties covered by insurance written through member agents include, among others, dwelling houses and their contents, wholesale and retail stores and their contents, office buildings, public buildings, factories, hotels, warehouses and terminals, garages and motor vehicles.

4. Fire and casualty insurance companies operate either by directly soliciting the policyholder through branch offices or by appointing an agent or agents to represent the company. In the New Orleans area, virtually all stock companies sell fire, casualty and surety insurance policies through agents rather than through branch offices. The statutes of the State of Louisiana require that any person who seeks to procure, receive or forward

[1] Hereinafter sometimes referred to as the New Orleans area.

applications for fire, casualty or surety insurance must be licensed by and subject to the supervision of the Insurance Commissioner of the State.

5. The amount of insurance that a particular insurance company will accept on a particular risk is known as the "capacity" of the company. Agents are acquainted with the capacity of a company either by means of a so called "line sheet" or through normal business contact with representatives of the company. But companies can and do increase their ability to accept risks through the employment of reinsurance. Some companies will readily accept risks in excess of their capacity. However, companies will accept risks in excess of their capacity only if, in their judgment, it is desirable to obtain reinsurance.

An agent is limited in the amount of fire insurance he can provide on a given risk by the capacity of the companies he represents plus the amount of reinsurance the companies decide to procure over and beyond their own capacities. Where the companies represented by an agent will accept only part of a risk which the agent seeks to insure, he must place the excess with other agents or brokers. Although the number of risks in this category is small, the risks involved are quite often very large. If an agent is unable to place the excess in this manner, he may lose the opportunity to secure any of the business.

6. The successful business operation of an agent is directly related to his opportunity to represent financially sound, well-managed insurance companies which possess sufficient capacity and facilities for handling the business he produces. Customers sometimes request the agent

to place their insurance with a particularly large, well known insurance company.

7. The successful business operation of a fire and casualty insurance company in any locality where the company desires to operate through agents is directly related to its opportunity to secure the representation of the most profitable and best established agencies. Control of the business resides to a great extent with the agents. The policyholder places business with the agents, and the choice of companies is generally left to the agent. Personal contract with the policyholder is confined to the agent, so that there is little a company can do to increase its business by direct appeal to the policyholder. Accordingly, the company seeks representation with the agent or agents possessing the largest established clientele. Furthermore, the company delegates to the agents wide discretionary powers which may involve substantial financial risk to the company. Therefore, it is essential that the company be represented by an agent who is skillful, reliable and responsible in the selection of risks, preparation of policies and reports, and the collection of premiums and the payment of claims.

8. The great majority of fire and casualty companies doing business in the New Orleans area maintain their home offices outside the State of Louisiana. There is a steady flow of supplies including, among other things, policy forms, maps and stationery from the home offices of the companies to agents located in New Orleans. Such supplies remain the property of the company and policy forms are returned upon termination of an agency. Agents on behalf of the companies solicit prospects, accept

or reject offers of fire and casualty insurance, issue policies and collect premiums. Agents make regular reports to company offices located outside the State of Louisiana. Premiums are mailed to the home offices directly by the local agent or to the general agent who in turn remits to the home office. Losses are generally reported to the home office and checks in payment of claims are sent to the agent from the out-of-state office. The foregoing business of these out-of-state corporations conducted by their local agents results in a continuous flow of business transactions between the local agents located in the New Orleans area and fire and casualty insurance companies outside of the State of Louisiana.

9. The Exchange occupies a dominant position in the fire, casualty and surety insurance market in the New Orleans area. During the period 1951 through 1954, member agents wrote: (1) 65.1% of all multiple lines of insurance written by fire and casualty companies in the New Orleans area; (2) 71.6% of all lines of insurance written in the New Orleans area under the jurisdiction of the Exchange; (3) 81.3% of fire insurance written in the New Orleans area; (4) 67.4% of casualty insurance (excluding accident and health) in the New Orleans area; and (5) 98.1% of surety insurance in the New Orleans area. In addition, member agents represent over 90% of the stock fire and casualty companies in the United States which possess assets in excess of $50,000,000.00. The dollar volume of business written by Exchange members is substantial, amounting to approximately $25,000,000 to $30,000,000 in premiums annually.

10. It is common knowledge among persons in the insurance field that members of the Exchange write the majority of fire, casualty and surety insurance in the New Orleans area. Nonmember agents have been prevented from representing Exchange companies which offer the only available facilities for writing certain risks in the fire, casualty and surety field because of the Exchange rules. As a result of their inability to obtain the facilities of Exchange represented companies, the operations of non-Exchange agents have been hampered and substantial loss has been incurred. Non-Exchange agents could increase their volume of business to a substantial extent if the facilities afforded by Exchange represented stock companies were available to them.

11. In order to qualify for active membership in the Exchange, an agent must, among other requirements, represent only stock companies; have as his only occupation the active solicitation of insurance from the public; receive a favorable vote from 75% of the active members of the Exchange, present at a meeting and voting; and purchase a share of stock in the Exchange and pay an assessment involving a total cost of approximately $1,000.

12. All members of the Exchange agree to be governed by the existing bylaws of the Exchange and such rules and regulations as may in the future be adopted by the Exchange.

13. Members of the Exchange agree to boycott and not to represent companies who appoint agents in Orleans, Jefferson and St. Bernard Parishes, Louisiana, for the sale of fire, casualty and surety insurance, who are not

members of the Exchange. This agreement has been in effect for many years and at least since February 14, 1936, and is still in effect.

14. Members of the Exchange agree to boycott and not to transact business for or with agents who are not members of the Exchange except upon arbitrary conditions adopted by the Exchange. Pursuant to this agreement, members agree not to place business with nonmember agents or with non-stock carriers unless and until the facilities of all members of the Exchange have been exhausted and an affidavit to that effect has been filed with the Secretary of the Exchange. The members also agree to accept business from nonmember agents and brokers only on the condition that no commission or other valuable consideration is paid directly or indirectly on such business; and, provided further, that the member immediately notifies the Secretary of the Exchange giving a description of the risk and further pays to the Exchange an amount equal to 10% of the net premiums involved. This agreement has been in effect for many years and at least since January 31, 1936 and is still in effect.

15. Members of the Exchange agree to boycott and not to represent nonstock companies. This agreement has been in effect for many years and at least since February 21, 1936 and is still in effect.

16. Members of the Exchange agree to boycott and not to represent companies which solicit fire, casualty or surety insurance in the New Orleans area directly from the policyholder. This agreement has been in effect for many years and at least since November 30, 1936 and is still in effect.

17. Members of the Exchange agree to accept business from members of the Exchange under suspension only on the condition that no commission is paid on such business.

18. Members of the Exchange agree that all members, with the exception of charter members, shall not be permitted to engage in any other business except the sale of insurance.

19. Members of the Exchange agree to abide by specified maximum commission rates to be paid to solicitors and other persons in business under the jurisdiction of the Exchange.

20. Members of the Exchange subscribe and adhere to a set of regulations or bylaws enacted by the membership to govern and control the business activities of members for the purpose and with the result of carrying out and enforcing the agreements set forth in Findings 12 through 19.

21. The rules of the Exchange contain provisions for the vigorous and comprehensive enforcement and policing of said regulations. Elaborate procedure is established for submitting, investigating and hearing complaints regarding violations of or failure to comply with the regulations and rules of the Exchange. As part of this procedure the executive committee of the Exchange is empowered to require members to furnish information relating to suspected violations and failure to comply subjects a member to discipline.

22. In accordance with the regulations of the Exchange, members who have been found guilty of violating

the regulations or rules of the Exchange have been fined, expelled, suspended or reprimanded.

23. The business activities of the members have been rigidly inspected, policed and supervised by the Exchange. In addition, the Exchange has maintained a close scrutiny of the business activities of nonmembers to assure that members of the Exchange are adhering to the bylaws of the Exchange.

24. As a result of the foregoing agreements, members of the Exchange have been coerced and intimidated into confining their representation of fire and casualty insurance companies to those companies which appoint Exchange agents exclusively.

25. As a result of the foregoing agreements, stock, fire and casualty insurance companies have confined their appointment of agents to members of the Exchange, and have cancelled the appointment of agents not members of the Exchange.

26. As a result of the foregoing agreements, an Exchange represented company which appoints any agent outside of the Exchange, is subjected to a boycott by its Exchange member agents.

27. As a result of the foregoing agreements, a person desiring to become an insurance agent in the New Orleans area must make a choice between two alternatives: (1) to join the Exchange and give up the right to sell low cost mutual insurance, give up the right to establish brokerage agreements with non-Exchange agents, and give up the right to represent any non-Exchange company; or

(2) not to join the Exchange, give up the right to establish brokerage arrangements with Exchange agents, and give up the right to represent any Exchange represented company.

28. As a result of the foregoing agreements, non-Exchange agents have been denied a free choice in seeking appointments to represent fire and casualty insurance companies in the sale of fire, casualty and surety insurance.

29. As a result of the foregoing agreements, non-member agents have been prevented from representing Exchange companies which offer the only available facilities for writing certain risks in the fire, casualty and surety field.

30. The operations of non-Exchange agents have been hampered and substantial financial loss has been incurred as a result of their inability to obtain the facilities of Exchange represented companies. Non-Exchange agents could increase their volume of business to a substantial extent if the facilities afforded by Exchange represented stock companies were available to them.

31. The same stock, fire and casualty insurance companies which operate in New Orleans exclusively through members of the Exchange are represented in other sections of the United States by agents who also represent mutual insurance companies.

32. Under normal conditions, insurance agents find it profitable and desirable to share business with each other where, for various reasons, an agent cannot place it with his own companies. As a result of the fore-

going agreements, insurance agents in the New Orleans area have been denied a free choice among other agents, and hence among fire and casualty insurance companies, in brokering fire, casualty and surety insurance.

33. On numerous occasions members and nonmembers sought to broker, and did broker, business with each other. In those instances in which Exchange members failed to conform to the foregoing rules of the Exchange and paid a commission to the nonmember agent, they were fined in amounts ranging up to $1,000 or ultimately expelled from the Exchange for refusal to pay the imposed fine.

34. As a result of the foregoing agreements, non-Exchange agents and brokers have lost substantial amounts of money in the form of commissions as a result of the Exchange rule prohibiting the payment of commissions to nonmembers on brokerage business.

35. As a result of the foregoing agreements, fire and casualty insurance companies desiring to conduct business in the New Orleans area have been denied a free choice in the selection of available outlets as represented by agents.

36. As a result of the foregoing agreements, all insurance companies represented by nonmember agents in the New Orleans area are prevented from obtaining the representation of Exchange agents who exercise substantial control over the majority of insurance business in the New Orleans area.

37. The companies referred to in Finding 36, all nonstock companies, and all companies which solicit insur-

ance directly from the public have been denied access to and have been excluded from a substantial part of the market for fire, casualty and surety insurance.

38. As a result of the foregoing agreements, Exchange represented companies have been prevented from soliciting insurance directly from the public through the medium of their salaried representatives.

39. As a result of the foregoing agreements, general agents have been prevented from soliciting insurance directly from the public.

40. By means of the foregoing agreements, the Exchange and its members have controlled and adversely affected the business operating policies of fire and casualty insurance companies, not only in respect to their choice of outlets, but also in various other vital phases of their operations.

41. Members of the Exchange boycotted stock insurance companies operating under the so-called American Agency System when these companies issued policies which offered the policyholders an opportunity to participate in the profits of the company through dividends, thereby reducing the net cost of the insurance: The members of the Exchange were fearful that this plan would lead to a reduction in their commissions.

42. With the purpose and intent of excluding competition and attempting to monopolize the sale and writing of fire, casualty and surety insurance in the New Orleans area, the Exchange and its members have boycotted mutual insurance companies, direct writing

stock companies, agency stock companies which issued policies through salaried representatives or offered participating policies, and have coerced organizations which planned to self-insure not to do so.

43. With the purpose and intent of excluding competition and attempting to monopolize the sale and writing of fire, casualty and surety insurance in the New Orleans area, the Exchange and its members for many years have been engaged and now are engaged in a continuing agreement and concert of action to prevent, hinder and discourage the selling and writing of fire, casualty and surety insurance in the New Orleans area through outlets other than those of its members and except on terms and conditions imposed by the Exchange and its members.

CONCLUSIONS OF LAW.

1. Pursuant to the terms of the foregoing agreements, the defendant and co-conspirators have been for many years and now are engaged in a conspiracy to restrain the business of selling and writing fire, casualty and surety insurance in the Parishes of Orleans, Jefferson and St. Bernard, Louisiana.

2. Pursuant to the terms of the foregoing agreements, the defendant and co-conspirators have been for many years and now are engaged in a conspiracy to monopolize the business of selling and writing fire, casualty and surety insurance in the Parishes of Orleans, Jefferson and St. Bernard, Louisiana.

3. Pursuant to the terms of the foregoing agreements, the defendant and co-conspirators have been for

many years and now are engaged in an attempt to monopolize the business of selling and writing fire, casualty and surety insurance in Orleans, Jefferson and St. Bernard Parishes, Louisiana.

4. The effect of the foregoing agreements is substantially to restrict competition and to control markets in interstate commerce in the writing and selling of fire, casualty and surety insurance.

J. SKELLY WRIGHT
United States District Judge

New Orleans, Louisiana
February 5, 1957

APPENDIX "G".

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 4292
CIVIL ACTION

UNITED STATES OF AMERICA,
Plaintiff

versus

NEW ORLEANS INSURANCE EXCHANGE,
Defendant

FINAL JUDGMENT.

The plaintiff, United States of America, having filed its complaint herein on January 15, 1954, the defendant, New Orleans Insurance Exchange, having appeared and filed its answer to such complaint, the issues having been tried from May 7, 1956 through May 9, 1956, final argument having been had on December 6, 1956, the Court having entered its Findings of Fact and Conclusions of Law together with its opinion on February 5, 1957, and it appearing to the Court that there is no just reason for delay in entering a Final Judgment, it is

hereby ORDERED, ADJUDGED AND DECREED as follows:

I.

The Court has jurisdiction of the subject matter hereof and of the parties herein. The defendant, New Orleans Insurance Exchange, has combined and conspired with its members and others to unreasonably restrain and to monopolize and has attempted to monopolize trade and commerce in fire, casualty and surety insurance, in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890 entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

As used in this Final Judgment:

(A) "Person" shall mean any individual, corporation, partnership, association or any other business or legal entity;

(B) "Exchange" shall mean the defendant New Orleans Insurance Exchange, a corporation organized and existing under the laws of the State of Louisiana;

(C) "Insurance" shall mean fire, casualty and surety insurance and each of them;

(D) "Mutual company" shall mean any insurance company in which proprietorship rights are vested in the policyholders rather than stockholders;

(E) "Participating company" shall mean any insurance company which allows its policyholders to par-

ticipate in the profits of the company through the issuance of dividends or otherwise;

(F) "Agent" shall mean any person engaged in the business of selling insurance as the representative of an insurance company.

III.

The provisions of this Final Judgment applicable to the defendant Exchange shall apply to such defendant, its members, officers, directors, agents, employees, successors, and assigns and to those persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise.

IV.

(A) The defendant Exchange is ordered and directed, within thirty (30) days from the date this Judgment becomes final, to terminate and cancel in their entirety the following bylaws, rules and regulations:

Article IV—Section 15

Article IX—Section 1

Article IX—Section 2

Article IX—Section 6

Article IX—Section 7

Article X—All sections

Article XV—Agency Appointments Committee—Sections 1, 2, 3

Article XVI—All sections

Article XVII—In its entirety

(B) The defendant Exchange and all those acting in concert with it are enjoined and restrained from maintaining, adopting, adhering to, enforcing or claiming any rights under any bylaw, rule or regulation contrary to or inconsistent with any provision of this Final Judgment.

V.

The defendant Exchange is enjoined and restrained from adopting, entering into, maintaining, adhering to, enforcing or claiming any rights under any bylaw, rule or regulation, or any contract, agreement understanding, plan or program in concert with any member or any other person, having the purpose or effect of:

(A) Any member or any person boycotting or otherwise refusing to do business with any person;

(B) Fixing, establishing, maintaining or determining commissions or other terms or conditions for the sale of insurance;

(C) Fixing, establishing, maintaining or determining the terms or conditions for the brokerage of insurance;

(D) Any member or any person boycotting or otherwise refusing to do business with any person who appoints as agent, or does business with, any nonmember of the Exchange;

(E) Any member or any person boycotting or otherwise refusing to do business with (1) any mutual company or any participating company, or (2) any person who does business with such mutual company or participating company;

(F) Any member or any person boycotting or otherwise refusing to do business with any person who solicits insurance directly from policyholders.

VI.

Defendant Exchange is enjoined and restrained from:

(A) Inspecting or claiming the right to inspect the books or records, or otherwise policing the business activities, of any of its members or any other person;

(B) Exacting or claiming the right to exact fines or other punitive damages from any of its members or any other person;

(C) Receiving or claiming any commissions for the sale of insurance;

(D) Preventing or restricting any member of the Exchange from engaging in any business.

VII.

Defendant Exchange is ordered and directed to:

(A) Mail an exact copy of this Final Judgment to each of its members and to each insurance company represented by any member of the Exchange;

(B) Furnish to each person applying for membership in said Exchange a copy of this Final Judgment upon acceptance of his application for membership;

(C) Require as a condition of a membership in defendant Exchange that each member agree to comply with the terms of the Final Judgment;

(D) File, within forty-five (45) days from the date that this Judgment becomes final, an affidavit with the Clerk of this Court certifying that the copies of the Final Judgment have been mailed in accordance with the provisions of Subsection (A) of this Section VII.

VIII.

Nothing contained in this Final Judgment shall prevent defendant Exchange from expelling from membership any member adjudicated guilty of violating the State of Louisiana insurance laws.

IX.

For the purpose of securing compliance with this Final Judgment and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant Exchange made to its principal office, be permitted (1) access during the office hours of the Exchange to those parts of the books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the Exchange which relate to any of the subject matters contained in this Final Judgment, and (2) subject to the reasonable convenience of the Exchange and without restraint or interference from it to interview officers or employees of said Exchange, who may have counsel present. No information obtained by the means provided in this Section IX shall be divulged by any representative of the Department of Justice to any person other than a duly authorized employee of the Depart-

ment except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

X.

One year from the date this judgment becomes effective, the Government shall file in the record a report of the progress on the compliance of the Exchange and its membership with this decree. This report shall be based on an analysis of the books and records of the Exchange and the books and records of the individual members thereof. The report shall show specifically whether or not the boycotts outlawed by this decree have been continued by the membership after the illegal bylaws have been repealed by the Exchange.

XI.

Jurisdiction is retained for the purpose of enabling either party to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof.

XII.

Judgment is entered against the defendant Exchange for all costs to be taxed in this proceeding.

New Orleans, Louisiana, March 19th, 1957.

J. SKELLY WRIGHT
United States District Judge

APPENDIX "H".

MINUTE ENTRY
WRIGHT, J.
APRIL 10, 1957

No. 4292
CIVIL ACTION

UNITED STATES OF AMERICA

versus

NEW ORLEANS INSURANCE EXCHANGE

IT IS ORDERED that defendant's motion for new trial be and the same is hereby denied.

IT IS FURTHER ORDERED that defendant's motion to amend the Findings of Fact and Conclusions of Law be and the same is hereby granted as to Paragraphs 1, 2, 8, 9 and 23 of the Findings of Fact proposed by the defendant.

IT IS FURTHER ORDERED that defendant's motion to amend the Findings of Fact and Conclusions of Law be and the same is hereby granted as to defendant's Proposed Findings of Fact Nos. 4, 7, 15, 18, 20, 22 and 26 as herein amended as follows:

period of the so-called "moratorium" during which the state legislatures were authorized by Congress to enact comprehensive insurance codes. The Government's entire case will collapse if this Court finds that the intent of Congress, as set forth in the McCarran Act, was to permit each state to tax and regulate "the business of insurance, and every person engaged therein * * *", and that the exception depended upon by the Government counsel does not retain for the Department of Justice what the Act itself so clearly delegates to the States.

In other words, the position of the Government in this case is that the McCarran Act, which permitted the comprehensive regulation of the insurance business by each state was rendered nugatory by Subsection 3(b), quoted above, which has a garbled and confused legislative history and an extremely doubtful meaning. If the Government's contentions are correct in this case, a **conspiracy to control prices**, or a **complete monopoly of the insurance business** in a particular state would clearly fall **outside** the provisions of the Sherman Act (where the legislature of a particular state has acted to regulate the business of insurance, as the Louisiana Legislature has acted); but the Sherman Act would still **exclusively control a refusal to deal**, or so-called "boycott", **where two individuals agree not to deal with a third party** in a business transaction involving interstate commerce.

The Government theory is that there is a violation of the Sherman Act if the owners of two corner drugstores (in cooperation with the local Parent-Teachers As-

sociation) agree not to deal with a non-resident publisher of comic books so long as the publisher insists on distributing horror and sex magazines to children; or if two insurance agents representing stock companies agree that they cannot conscientiously operate a "mixed agency", representing both stock and mutual insurance companies, because of the conflicts of interest which will immediately arise. According to the Government theory this is a "boycott" subject to criminal prosecution by the Department of Justice, under the Sherman Act; whereas a conspiracy by the five largest insurance companies in the United States to fix prices would be subject exclusively to state control!

The entire foundation of the Government's position in this case rests upon an interpretation that Section 3(b) of the McCarran Act, quoted above, **added** to the prohibitions of the Sherman Act "boycott, coercion, or intimidation". It is difficult to understand how the Government can base its entire position upon a contention that the abortive Subsection 3(b) of the McCarran Act can breathe life into the Sherman Act in a case involving alleged acts of "boycott, coercion, or intimidation", whereas the Sherman Act itself contains no such language.

Stated differently, Congress has specifically authorized the Legislatures of the various states to enact comprehensive insurance codes regulating the business of insurance, and it is conceded by the Government, and was found by the District Court,[1] that Louisiana has adopted

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[1] 148 F. Supp. 915, at page 920, footnote 17, reading: "Louisiana has a comprehensive insurance code providing for the complete regulation of the insurance industry within the State. La. R. S. 22:1-22:1734.

a completely comprehensive insurance code, even including regulation and control of acts of "boycott, coercion, and intimidation".[2] The Sherman Act does not prohibit or even refer to acts of "boycott, coercion, or intimidation", but, on the contrary, prohibits **monopoly, combinations in restraint of trade, and attempts to monopolize or restrain trade.** Consequently, if the alleged activities of the Defendant constitute a monopoly, a restraint of trade, or an attempt to monopolize or restrain trade, **such activity is regulated and controlled by the comprehensive Louisiana Insurance Code,** and is not subject to injunctive relief under the Sherman Act; and if the alleged activities of the Defendant constitute "boycott, coercion, or intimidation" **not** amounting to monopoly or restraint of trade, or attempts to monopolize or restrain trade, **such activities do not violate any provisions of the Sherman Act!**

It is difficult to comprehend how Appellee can contend that this single question is "so unsubstantial as not to need further argument", and yet that is the conclusion set forth in the opinion and closing paragraphs of Appellee's Motion to Affirm.

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[2] Louisiana Revised Statutes of 1950, Title 22, Section 1214 A. "The following are declared to be unfair methods of competition and unfair or deceptive acts and practices in the business of insurance * * *"

(4) "Boycott, coercion and intimidation. Entering into any agreement to commit or by any concerted action committing any act of boycott, coercion or intimidation resulting or tending to result in unreasonable restraint of, or a monopoly in, the business of insurance."

EFFECT OF THE SOUTH-EASTERN UNDERWRITERS CASE.

A second serious and substantial question is presented in the voluminous briefs filed in the District Court by Appellant, showing that this Court held for years in a long line of decisions, starting with *Paul v. Virginia*, 8 Wall. (U. S.) 168, that the business of insurance was not interstate commerce, and did not fall within the contemplation of the Sherman Act, but, on the contrary, was strictly subject to control and regulation by the state legislatures. In *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, this Court considered a **criminal indictment** charging certain **nonresident** insurance **companies** with a conspiracy to fix arbitrary and noncompetitive premium rates, and **by that means** to restrain and monopolize trade and commerce in fire insurance. The Government contends that that decision held unequivocally and once and for all that the business of insurance **is** interstate commerce. However, it is Appellant's contention, and there is strong reason to hold, that the decision of this Court in the *South-Eastern Underwriters* case should be limited to its facts, and that in a situation such as the one involved in the present proceedings the long line of decisions represented by *Paul v. Virginia* should control.

THE RULE OF REASON.

Another most substantial question is whether or not the restraint of trade, if any existed in the present case, was either a) **substantial,** or b) **unreasonable.** Numer-

ous decisions of this Court have been cited by Appellant in the District Court to support its position that the restraint or monopoly, if any existed or was attempted in the present case, was not substantial, and was not unreasonable. If this Court should find that there was a restraint of trade or a monopoly but that such restraint a) was not substantial, or b) falls within the "Rule of Reason" so frequently adopted and applied by Your Honors, then these proceedings must be dismissed. In this connection it is significant to note that although this Court has not as yet passed directly on a factual situation such as the one involved in the present case, all of the numerous authorities, both State and Federal, cited by Appellant to the District Court, held that by-laws and practices such as those of the Defendant in the present case were **both reasonable and necessary,** and did not violate any of the State or Federal statutes involved in those cases. No final decision to the contrary, involving the rules or activities of a trade association or exchange, such as the New Orleans Insurance Exchange, were cited by Appellee in the District Court. All of these decisions cited by Appellant were completely ignored by the District Judge, and were not even commented upon by him in his extensive opinion.

OTHER SUBSTANTIAL QUESTIONS.

The Jurisdictional Statement filed in this Court by Appellant sets forth **eleven** distinct substantial questions on which the decision of this case depends, including, for

example, a consideration of whether the District Judge properly issued an injunction to restrain activities which were neither occurring nor threatened at the time the complaint was filed, or thereafter.

CONCLUSION.

We are convinced that Rule 16 of the Revised Rules of this Court, **pertaining exclusively to motions to dismiss or affirm**; does not contemplate a presentation of arguments and citations in support of Appellant's position **on the merits of the case.** Consequently, this brief has been devoted solely to pointing out a few of the extremely substantial questions on which the decision of this case depends. It is Appellant's understanding that the proper time to develop fully the arguments and authorities on the merits of the case will be after the Court has noted jurisdiction and briefs are filed in accordance with the Revised Rules of this Court.

This case involves substantial questions of a far-reaching nature, not only in the State of Louisiana, but throughout the United States. Of utmost importance will be a determination of whether the legislature of each state shall be given authority to regulate the business of insurance, as contemplated by the Congress in the McCarran Act, or whether, as contended by the Government, paramount control shall remain in Washington, by virtue of a strained construction of an abortive exception appearing in the McCarran Act.

We respectfully submit that Appellee's Motion to Affirm should be denied, and this Court should enter an order noting jurisdiction.

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CERTIFICATE.

I, MURRAY F. CLEVELAND, one of the attorneys for the New Orleans Insurance Exchange, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ● day of October, 1957, I served copies of the foregoing brief opposing Appellee's Motion to Affirm on the United States of America by a) depositing a copy thereof in a United States mailbox, with airmail postage prepaid, addressed to the Honorable J. Lee Rankin, Solicitor General of the United States, Washington 25, D. C., b) depositing a copy thereof in a United States mailbox, with airmail postage prepaid, addressed to the Honorable Victor R. Hansen, Assistant Attorney General of the United States, Washington 25, D. C., and c) depositing a copy thereof in a United States mailbox, with first class postage prepaid, addressed to the Honorable M. Hepburn Many, United States Attorney for the Eastern District of Louisiana, Federal Building, New Orleans, Louisiana.

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